

Prosecuting Attorneys in Dependency Proceedings in Juvenile Court

Defining and Assessing a Critical Role in Child Abuse and Neglect Cases

Significant legal scholarship has identified and examined various issues related to legal representation for children, parents, and social services agencies in civil dependency proceedings.¹ Efforts to define the characteristics of the various legal roles are essential to achieving appropriate social services goals and for the care and protection of abused and neglected children.

One critical piece of the child protection mosaic remains relatively unexplored, however: the role of the prosecuting attorney. The prosecuting attorney's role has important ramifications in dependency cases. The prosecuting attorney can potentially affect social services goals, the time spent by children and families in the child welfare system, and the specific objectives of each particular proceeding.² Thus, an accurate and succinct analysis of the role of the prosecuting attorney in dependency proceedings and a comprehensive discussion of the salient issues and concerns that emerge from that role are needed.³

To that end, this article will draw on a number sources: state statutes and case law, which describe the duties and responsibilities of the prosecuting attorney; legal literature and social science research; and data provided by prosecuting attorneys and other child welfare professionals nationwide who responded to a survey questionnaire by the National Center for Juvenile Justice during Fall 1998, hereinafter referred to as the NCJJ survey.⁴ Anecdotes and opinions from practitioners are provided throughout to illustrate the various topics under consideration. By combining formal legal research and practical insight this article provides a snapshot of the role of the prosecuting attorney in dependency proceedings and a detailed analysis of the issues accompanying that role.

THE PROSECUTING ATTORNEY

The prosecuting attorney is the officer appointed or elected in each state or county to represent the state or county in judicial proceedings. Various titles and designations exist in state statutes and constitutions. See Table 1 for the title of the prosecuting attorney in each state.

With respect to criminal matters, a prosecuting attorney is "the foremost representative of the executive branch of government in the enforcement of criminal law in his county."⁵ As such, the prosecuting attorney is responsible for prosecuting all criminal violations on behalf of the state or county in which he or she is elected or appointed.

With respect to civil matters, depending on local law or policy, the prosecuting attorney may represent the state or county in civil matters, including the local



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Significant legal scholarship has identified and examined issues and concerns related to legal representation for children, parents, and social service agencies in civil dependency cases in juvenile court. However, one critical piece of the mosaic of child protection remains largely unexplored: the role of the prosecuting attorney. Because actions by prosecuting attorneys may significantly influence the initiation, direction, and progress of both civil dependency cases and parallel criminal child abuse prosecutions, a detailed and comprehensive discussion of the prosecuting attorney's role in such cases is important in efforts aimed at improving the child welfare system.

Using state statutes, case law, legal and social sciences literature, and the responses of prosecuting attorneys, judges, agency attorneys, and other child welfare professionals to an exploratory survey, this article defines and assesses the role of the prosecuting attorney. Combining formal research and practical insight, the article describes and examines prosecutors' involvement in both civil

and criminal child protection proceedings. The result is a snapshot of the prosecutorial models used in various jurisdictions and a discussion of the complex issues and concerns that may accompany each structure. ■

Table 1. Title of Prosecuting Attorney by State

Title	State(s)
Prosecuting Attorney	Arkansas, Hawaii, Indiana, Michigan, Missouri, Ohio, Washington, West Virginia
District Attorney	Alabama, Alaska, California, Colorado, Georgia, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Nevada, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Texas, Wisconsin
State's Attorney	Connecticut, Florida, Illinois, Maryland, North Dakota, South Dakota, Vermont
Commonwealth's Attorney	Kentucky, Virginia
County Attorney	Arizona, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, Texas, Utah
County and Prosecuting Attorney	Wyoming
Attorney General	Delaware, Rhode Island, Tennessee
Circuit Solicitor	South Carolina

Source: NCJJ Survey, Fall 1998; NATIONAL DIRECTORY OF PROSECUTING ATTORNEYS, 1998.

department of social services in child protection proceedings, otherwise known as dependency proceedings. See Figure 1 for a description of the legal authority of the prosecuting attorney by state.

CHILD PROTECTION PROCEEDINGS

When the child protection division of the social services agency receives information regarding an incident of suspected child abuse or neglect, it conducts an investigation into the allegations. In 1997, nearly 3.2 million children were reported to child protective services agencies in the United States regarding child abuse and neglect.⁶ Child protective services agencies confirmed that just over 1 million (1,054,000) children were victims of child maltreatment, a figure that represents 15 out of every 1,000 children in the United States.⁷

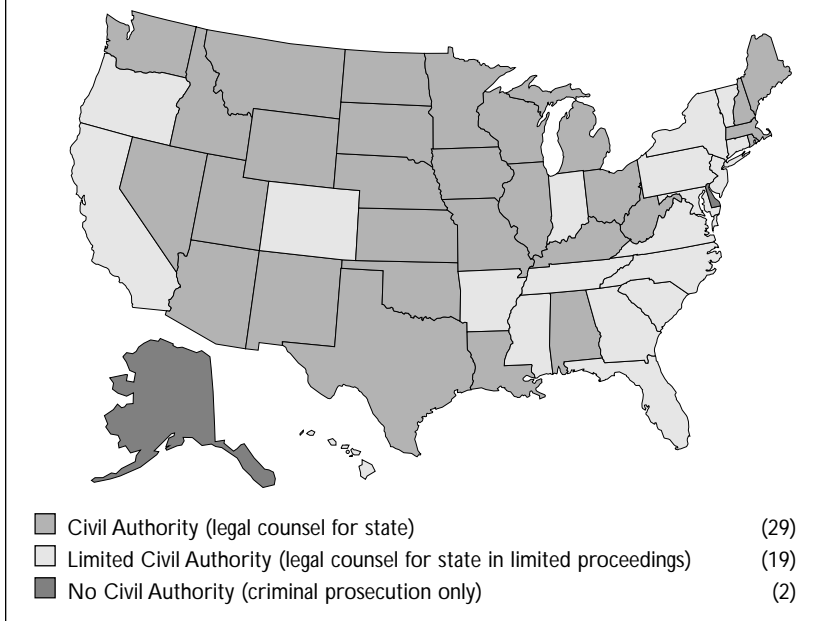
These cases illustrate the nature of child abuse in 1997: physical abuse (22 percent), sexual abuse (8 percent), neglect (54 percent), emotional maltreatment (4 percent), and other forms of maltreatment (12 percent).⁸ Current data on child maltreatment fatalities indicate that child protection agencies confirmed 1,185 deaths related to child abuse and neglect in 1996.⁹ Although the percentage of confirmed child sexual abuse cases appears relatively low, this number represents approximately 84,320 new cases of child sexual abuse in 1997, which is a substantial threat to the child's well-being.¹⁰

JUVENILE OR FAMILY COURT PROCEEDINGS

Although initially an agency typically attempts to address issues of abuse or neglect by offering voluntary services to the family, it may file a petition for supervision over the child seeking the jurisdiction of the juvenile court.¹¹ Different jurisdictions use different nomenclature to define these proceedings: "dependency," "children in need of assistance," "child in need of protection," "care and protection," or

Figure 1. Authority of Prosecuting Attorney

Source: NCJJ Survey, Fall 1998



“wardship” proceedings. The term “dependency proceedings” will be used hereinafter to describe these child abuse and neglect proceedings.

CRIMINAL COURT PROCEEDINGS

Incidents of child abuse and neglect may also result in parallel proceedings in criminal court.¹² Examples of such cases include sexual abuse and extreme cases of physical abuse and neglect that result in long-term trauma, permanent injuries, and death.¹³ A detailed and comprehensive collection of criminal child abuse laws can be found in Volume V (*Crimes*) of the *Child Abuse and Neglect State Statute Series* (1998), a publication of the National Center for Prosecution of Child Abuse. Criminal proceedings arising from such incidents are primarily designed to determine the guilt or innocence of the alleged perpetrator and, if the perpetrator is found guilty, to impose punishment.¹⁴

A STATISTICAL FRAMEWORK FOR DISCUSSING CIVIL AND CRIMINAL CHILD PROTECTION PROCEEDINGS

Most child abuse and neglect cases are handled by child welfare agencies without the courts’ assuming jurisdiction over the child victims.¹⁵

Data from studies in local jurisdictions suggest that the vast majority of reports do not result in court involve-

ment.¹⁶ For example, a recent study conducted in Denver, Los Angeles, and New Castle County, Delaware, found that dependency petitions seeking formal juvenile court jurisdiction were filed in only 21 percent of the substantiated cases of child abuse and neglect in that county.¹⁷ Applying this figure to the number of child abuse cases confirmed by child protective services agencies nationwide in 1997 (1,054,000) yields an estimated 220,000 dependency petitions filed annually, or 3 for every 1,000 children, assuming one petition per child.

According to a recent study funded by the National Institute of Justice and conducted by Educational Development Center, Inc., and the American Bar Association’s Center on Children and the Law¹⁸ that surveyed 103 criminal prosecutors and 59 child protection agency

attorneys nationwide,¹⁹ prosecutors estimated that 60 percent of their child maltreatment cases were concurrently involved in juvenile court proceedings; in the same study, child protection agency attorneys estimated that 13 percent of their cases had parallel criminal proceedings.²⁰ Thus, it is much more likely that a petition will be filed in juvenile court when there are also criminal charges of abuse.

PROSECUTORIAL STRUCTURE OF CHILD PROTECTION COURT PROCEEDINGS

As indicated previously, incidents of child abuse and neglect may result in two separate court proceedings based on the same circumstances.²¹ These cases are distinct proceedings in separate court systems. Involvement by the prosecuting attorney in one or both types of cases may assume different forms and varies from jurisdiction to jurisdiction.

SINGULAR INVOLVEMENT BY THE PROSECUTING ATTORNEY

In some states, the prosecuting attorney handles adult criminal proceedings against parents or guardians only when the child abuse or neglect constitutes a crime. He or she is not involved in civil dependency proceedings in the juvenile or family court. Typically, agency attorneys,

either employed by the social services agency or provided by the local government, will be responsible for civil dependency proceedings and act as legal counsel for the agency in the proceedings.²² The agency attorney may represent the interests of the child protection agency or the interests of the state.

Note, however, that even under these circumstances, the prosecuting attorney may still have limited involvement in dependency proceedings. For example, most states require child protection agencies to provide prosecuting attorneys with notice of all reports alleging child abuse or neglect. In addition, legislation in many states requires the prosecuting attorney to participate in multidisciplinary team meetings to review cases of child abuse and neglect.²³

Because the criminal prosecutor in almost every jurisdiction has a statutory means of acquiring all records in the dependency case file,²⁴ parents may be reluctant to

child welfare system and the criminal justice system without undermining the integrity of either.

DUAL INVOLVEMENT BY THE PROSECUTING ATTORNEY

In other states, the prosecuting attorney is responsible for presenting civil dependency proceedings as well as prosecuting criminal cases against parents. Jurisdictions vary with respect to the organization of the office of the prosecuting attorney. For example, in some jurisdictions, the office of the prosecuting attorney contains separate units or divisions that prosecute the respective cases.²⁵ In smaller or more rural jurisdictions that have fewer prosecuting attorneys, prosecutors may handle both types of cases.²⁶

Jurisdictions also vary with respect to the interests represented by the prosecuting attorney. In some areas, the prosecuting attorney represents the interests of the agency;²⁷ in other areas, the prosecuting attorney represents the interests of the state.²⁸

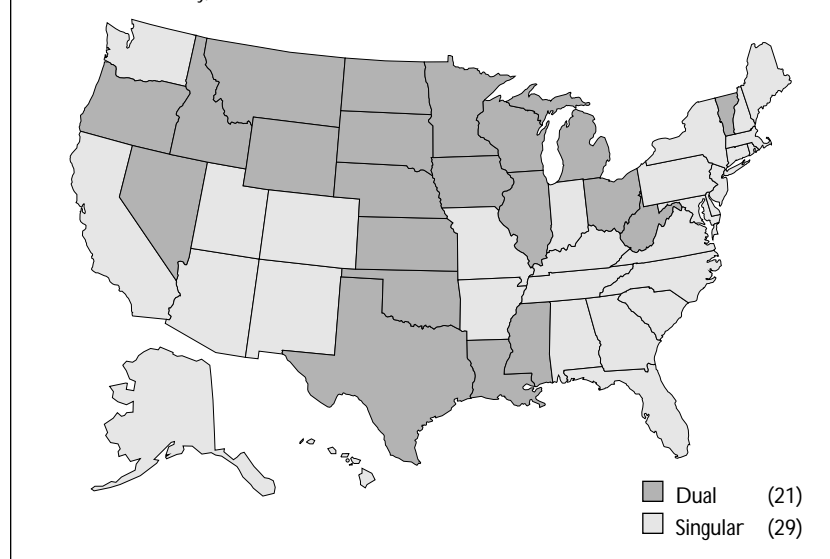
In jurisdictions where the prosecuting attorney is involved in both the civil and the criminal proceedings, he or she may face a serious dilemma. As legal counsel for the department of social services or as representative of the state's interests, the prosecuting attorney must strive to resolve cases by settlement with parents who cooperate fully and honestly with the social services providers. Such cooperation could involve parents admitting to criminal acts, such as sexual abuse and driving under the influence. However, the prosecuting attorney is bound by oath to prosecute all crimes on behalf of the state.

The conflict is easily understood but not easily remedied. Issues of child protection, fairness to parents, reconciliation of diverse interests,

and effective legal advocacy become especially significant. The prosecuting attorney must reconcile the different goals that underlie the criminal and civil system. He or she must also balance the parents' constitutional right to preserve the integrity of the family unit and to be protected from self-incrimination against the child's best interest. Finally, the prosecuting attorney must define the client and the interests being represented during court proceedings. Figure 2 illustrates prosecutorial models by state.

Figure 2. Prosecutorial Models by State

Source: NCJJ Survey, Fall 1998



comply with social services for fear that incriminating information will be available to the prosecuting attorney for the later criminal proceedings. Moreover, although criminal prosecution and incarceration of an abusive parent may serve the interest of the public in punishing individuals who commit crimes, it may not always serve the best interest and welfare of a child. Participating in a criminal investigation and trial may be traumatic for a child, and there is no guarantee of a guilty verdict. The prosecuting attorney must therefore fulfill the goals of both the

CONSIDERATIONS RELATED TO PROSECUTORIAL STRUCTURE

Actions by the prosecuting attorneys in both contexts have the potential to significantly affect the direction, progress, and resolution of both types of cases. Both prosecutorial structures raise similar important considerations regarding the efficient, effective, and fair processing of both civil and criminal child protection cases.

FUNDAMENTAL PHILOSOPHICAL DIFFERENCES IN GOALS AND OBJECTIVES

Fundamentally different philosophies form the basis for the criminal justice system and the child welfare system. In criminal proceedings, the prosecuting attorney seeks to protect the public safety and ensure social order. As Edwards notes, “In the criminal court, the judge, prosecutor and other participants are focusing upon the offending parent and determining the degree to which the aims of the criminal law should be applicable to him.”²⁹

In contrast, in dependency proceedings, the social services agency seeks to protect children and assist families in need by providing critical social, economic, and medical services. “In the juvenile court, the judge and other participants in the legal process attempt to structure a program that will be in the best interests of the child.”³⁰ While the criminal system looks at what happened and what sanctions may apply, the civil system looks at why it happened and what preventative measures should be implemented.³¹

This marked difference in philosophy underlies the goals and objectives of each system. As Curran puts it, “Just as the courts are different, the expectations and roles of attorneys who represent abused children are also very different.”³² In the criminal justice system, the goal of the state is punishment for individuals who behave in ways that society has deemed unacceptable and deterrence of similar behavior by others. The prosecuting attorney uses evidence proving that particular events or incidents occurred and holds people accountable for their behavior.

In contrast, the goal of the child welfare system is protection for children and treatment and rehabilitative services for families. The social services agency uses information about families and their members to evaluate situations and provide the appropriate assistance to enable families to resolve the issues that led to agency intervention and court supervision.

However, scholars have criticized this distinction of treatment versus punishment as manufactured. Besharov, for example, argues:

The dichotomy between “treatment” and “punishment” is somewhat artificial. A criminal prosecution can provide important rehabilitative services. Conversely, a civil child protection proceeding, which can involve the child’s forced removal from the parents’ custody and the parents’ involuntary treatment, has indisputably punitive aspects.³³

Nonetheless, when the prosecuting attorney is involved in both proceedings, he or she faces a difficult challenge: reconciling basic differences in perspective and approach to effectively fulfill both roles simultaneously.

Unique evidentiary rules, different time frames, and distinct standards of proof govern each proceeding. Each proceeding serves different interests and considers different factors. For example, the best interest of the child may not be served by incarceration of the abusive parent.³⁴ As one scholar notes:

Prosecutors generally are sensitive to the welfare of child victims. Indeed, many prosecutors view the child as their second client—the first client being the citizens of the community. Nevertheless, the prosecutor in a criminal case is not the child’s attorney, and cases arise in which the prosecutor’s strategic decisions are not in the child’s best interest.³⁵

Moreover, compliance by parents who receive treatment has great significance in civil proceedings and less importance in parallel criminal proceedings. The same is true for the myriad of social, economic, and emotional factors that affect families. Mental illness, substance abuse, addiction, unemployment, domestic violence, lack of education—these are often primary considerations in civil dependency proceedings and are properly considered in court decisions.³⁶ However, such extenuating circumstances are not necessarily considered in criminal prosecutions. When considered, they are often seen as secondary mitigating factors for purposes of sentencing.

This challenge may also create internal conflict for prosecuting attorneys. A prosecutor swears an oath to prosecute all crimes that have been committed within his or her jurisdiction and to protect the public interest. The prosecuting attorney also represents the state’s interests in preserving the integrity of the family and providing for the welfare of children. If while attending a multidisciplinary treatment team meeting or a case staff meeting where a father is encouraged to cooperate with treatment objectives and subsequently confesses to sexually molesting his daughter, how can the prosecutor then initiate criminal charges against him? How can the prosecutor not?

A number of respondents to the NCJJ survey commented on the fundamental philosophical difference between civil dependency proceedings and criminal prosecutions:

Criminal prosecution's goal is to seek justice on behalf of the state against one who is alleged to have violated a state law, whereas the dependency proceeding is strictly focusing on the best interest of the child. The goals are different, as well as the party on whom the proceeding is focused. (Commonwealth's Attorney, Virginia)

The same attorney should not be involved in both proceedings on account of the fact that the interest of the two agencies—one involved in criminal prosecution and the other involved in dependency proceedings—have different goals and objectives and client interests. Accordingly, it would be difficult, if not virtually impossible, for one attorney to "wear both hats" at the same time. (County Attorney, New Hampshire)

The issues in both proceedings are different. The issue in the civil matter is "the best interest of the child" while the issue in the criminal matter may be the best interest of society, punishment, or rehabilitation. It is possible, if the same attorney handled both matters, that the issues could become blurred. (Assistant District Attorney, Maine)

The prosecutor represents the community at large, not just the victim. The attorney in the dependency cases is concerned only about the child's best interests. (Assistant State's Attorney, Maryland)

As a prosecutor, our concerns are not always the same as the attorney involved in a dependency and neglect action which may be focused on reunification, etc. (District Attorney, Colorado)

In a criminal case, there is more than simple neglect at issue. There are different, and equally important, agendas to serve. (District Attorney, Colorado)

The goals of the two proceedings are generally different or at least vary from case to case. When one attorney has both proceedings, one or both may be compromised. (State's Attorney, Connecticut)

Different proceedings require different procedures and different outlooks. (State's Attorney, Florida)

FAIRNESS CONSIDERATIONS FOR PARENTS

Although numerous states have enacted statutes that criminalize certain acts of child abuse and neglect, the majority of dependency cases do not have a related criminal proceeding pending against the parent or guardian. However, in recent years, the criminalization of child abuse and neglect has increased significantly. Dorcas Hardy, former Assistant Secretary of the U.S. Department of Health and Human Services, articulated one possible reason for this increase in testimony given before the Seventh National Conference on Child Abuse and Neglect in Chicago in 1985:

Let us make one thing clear when we are talking about child abuse. We are talking about cruelty, we are talking about a violent action that is a crime. Child abuse is a crime, and the more people know that, the more they might think twice about committing such a crime. The campaign against drunk drivers is effective in some states because the accused knows that an angry society, an angry victim or his family, and an angry court system won't let the driver get away with it.³⁷

This attitude and the resulting changes in legislation have profound implications for the rights of parents, who face an increased likelihood of criminal charges and involvement by the prosecuting attorney.

The Fifth Amendment and the Privilege Against Self-Incrimination

The Fifth Amendment grants all persons a constitutional protection against self-incrimination: "No person shall be compelled in any [criminal case] to be a witness against himself."³⁸ Each person has the privilege not to be called as a witness and not to testify and to refuse to disclose any matter that may tend to incriminate him or her. It is well settled in case law that the privilege against self-incrimination extends to any proceeding, civil or criminal, where answers to official questions may incriminate the individual.³⁹ Thus, parents may refuse to testify in a dependency proceeding or to cooperate with treatment providers by providing information that might incriminate them.

Nearly a decade ago, legal scholars began discussing the potential unfairness to parents in child protection proceedings, especially when the prosecuting attorney is involved in both the civil dependency proceeding and the criminal prosecution. One writer notes:

There is a growing disagreement among the states on whether forcing a parent to confess to child abuse in court-ordered therapy as a condition of family reunification violates the parents' privilege against self-incrimination. In most jurisdictions, either the same prosecutor represents the government in both the dependency and criminal child abuse proceedings, or at least the criminal prosecutor has access to the parent's court-ordered therapy statements.⁴⁰

Thus, parents confront a situation where the state has considerable power to persuade and compel compliance with social services and treatment provisions as well as to punish parents when the child abuse or neglect constitutes a crime.

Parents face a very serious dilemma. If they cooperate with the social services agency, they are more likely to maintain contact with their children, but they risk providing the prosecuting attorney with incriminating infor-

mation for any potential criminal prosecution. If they refuse to comply with treatment and services, they preserve their constitutional right against self-incrimination but risk loss of custody or contact with the children.⁴¹ Similarly, Patton notes:

The message to parents is clear from all sources: dependency court is an informal environment in which cooperation is critical and formal legal rules are impediments. Yet parents who cooperate risk helping district attorneys convict them of criminal child abuse.⁴²

Patton explains why parents have reason to be concerned: "In almost every jurisdiction, the criminal prosecutor has a statutory means of acquiring all records in the dependency court file."⁴³ Patton further notes: "Unlike just a few years ago, the criminal prosecutor can now discover almost all confidential data in the juvenile dependency court file, including parents' statements that the prosecutor cannot directly discover in the criminal case."⁴⁴

The results of putting parents to such a choice are unfortunate. Parents who fear incrimination from testifying in civil dependency proceedings or participating in therapy may be less likely to cooperate with the social services agency until the pending criminal matter is resolved. Because successful treatment often depends on acknowledging incidents of abuse or neglect, this dilemma undermines efforts to address the issues that brought the family to the attention of the agency and the actual progress toward reunification of the family.

Case Law Interpreting the Fifth Amendment Privilege Against Self-Incrimination for Parents in Civil Dependency Proceedings

In 1986, a Minnesota trial court adjudicated 11-week-old twin girls as dependents of the court after physicians reported serious physical injuries, including retinal hemorrhage, bruises, chip fractures in both arms and legs, and rib fractures in both girls to the Department of Human Services.⁴⁵ Neither parent offered any explanation for the children's injuries in their testimony.⁴⁶

The trial court found as a fact that "the parents need to acknowledge the causes of the children's injuries before any meaningful change will occur in the care and treatment they provide to the children"⁴⁷ and ordered that the parents cooperate fully in a psychological and psychiatric evaluation process.⁴⁸ The father appealed, claiming that required cooperation with a psychological evaluation compelled him to incriminate himself and enhanced the threat of criminal prosecution.⁴⁹

On appeal, the Minnesota appellate court acknowledged that the privilege against self-incrimination applies in civil as well as criminal proceedings⁵⁰ and that "if testi-

mony in a civil action would enhance the threat of criminal prosecution, the privilege may be invoked."⁵¹ The court further noted that "an individual may not be compelled to testify absent a grant of immunity from use of the statements in any subsequent prosecution."⁵²

However, the court found that the state was not attempting to impose an unconstitutional penalty on the father or posing an unconstitutional choice.⁵³ The court explained:

Appellant has not been threatened with sanctions for refusing to waive his privilege. Appellant has not been placed in a situation in which the state has required him to either waive immunity and testify or suffer dire consequences. In fact, appellant has not demonstrated that he has been faced with a situation in which he has sought to exercise his privilege.⁵⁴

The court continued:

While recognizing appellant's rights in this matter, we also recognize the state's interest and the children's rights. The state has both a strong interest and a mandate to protect these children from an environment where they have suffered brain damage and repeated fractures. The state is required to work with the parents to correct the conditions which caused the abuse with the aim of returning the children to the parents as soon as this can be done safely.⁵⁵

According to the court, if the appellant is unable or unwilling to address behavior that led to abuse, the children cannot be safely returned to his or her custody.⁵⁶ The appellate court affirmed the decision of the trial court, reasoning that "the trial court's finding that the parents need to recognize the cause of the children's injuries before any meaningful change can occur recognizes that a parent who acknowledges the need for professional help is more amenable to treatment than one who denies the need for help."⁵⁷ Therefore, if termination of parental rights should be the ultimate result, it is not "a sanction for exercise of a constitutional right, but simply the necessary result of failure to rectify parental deficiencies."⁵⁸

The dissent proposed an alternative solution—granting use immunity to the appellant:⁵⁹

The simplest solution would be to grant use immunity to appellant. This would achieve the desired effect of allowing appellant to discuss freely with therapists, doctors, and the welfare department his conduct and actions pertaining to his children, his feelings about them, and what course of conduct he perceives himself pursuing in the future to better the parent/child relationship.⁶⁰

According to the dissent, "[N]o good purpose can be served by withholding immunity if the trial court and respondent State are serious that an affirmative admission

by appellant that he caused the injuries is a prerequisite to therapy.”⁶¹

In 1988, the Iowa appellate court considered whether a requirement that the parents complete a sexual abuse treatment program in which an admission of sexual abuse was required amounted to denial of due process because such a requirement conditioned the preservation of one constitutional right, that of preserving the integrity of the family unit, on the forfeiture of another constitutional right, that of protection against self-incrimination.⁶² The appellate court upheld the requirement, holding that “the requirement that the parents acknowledge and recognize the abuse before any meaningful change can occur is essential in meeting the child’s needs.”⁶³

Ten years later, a Nebraska trial court terminated the parental rights of the mother of three children solely because she refused to acknowledge sexual contact with them. The mother appealed the order, claiming a violation of her right against self-incrimination.⁶⁴ The appellate court acknowledged the validity of the claim:

Suzette accurately characterizes the dilemma with which the juvenile court presented her: either acknowledge that she sexually abused her children so that she can become enrolled in Parents United, while at the same time potentially incriminating herself for sexual abuse of her children, or refuse to incriminate herself and have her parental rights terminated because she exercised her right not to incriminate herself. Our review of the court’s rehabilitation orders, coupled with the court’s knowledge that Suzette’s acknowledgment of sexual conduct with the children was a prerequisite to satisfying the rehabilitation plan, and review of the motion to terminate Suzette’s parental rights and the court’s order terminating her parental rights, leads us to conclude that the court presented Suzette with precisely that dilemma.⁶⁵

The appellate court sought guidance for its decision in the case law of other jurisdictions:

A review of the authority in other states indicates that there is a very fine, although very important, distinction between terminating parental rights based specifically upon a refusal to waive protections against self-incrimination and terminating parental rights based upon a parent’s failure to comply with an order to obtain meaningful therapy or rehabilitation, perhaps in part because a parent’s failure to acknowledge past wrongdoing inhibits meaningful therapy. The latter is constitutionally permissible; the former is not.⁶⁶

The court reversed the termination order of the lower court because the unconstitutional choice represented an impermissible singular basis for the decision to terminate parental rights.⁶⁷ However, the court specifically limited the holding to situations in which a court terminates

parental rights on the sole basis of a parent’s refusal to waive his or her right against self-incrimination.⁶⁸

PROCEDURAL SAFEGUARDS

As the preceding discussion makes clear, parents face a serious dilemma: either cooperate with treatment recommendations and risk incrimination with respect to any future criminal prosecution, or refuse to cooperate with services and risk loss of custody and possibly visitation with the children. Such a choice could inhibit candid discussion regarding abuse or neglect, thus undermining the social services agency’s efforts to address the issues that led to its involvement. The unfortunate result is delay in all phases of the proceedings: in the identification of important family concerns; in the determination of appropriate services for resolving those concerns; in the implementation and completion of such services or the determination that such services are unsuccessful; and, finally, the achievement of safety and permanence for children, whether through continued placement or reunification with biological families or in another placement capable of providing care and protection.

Numerous respondents to the NCJJ survey addressed this issue of fairness to parents. For many prosecutors, in the context of protecting children, such fairness concerns must yield.

Children are the most vulnerable members of our society. When criminal prosecution is necessary to protect them, our hands should not be tied by further limiting our ability to introduce evidence in court to convict an abusive or neglectful parent. (Prosecuting Attorney, Michigan)

It is a grave injustice to the children to artificially put up barriers around the prosecutor’s access to information in some naïve belief that parents who are also criminal perpetrators would somehow magically cooperate more fully with social services agencies and therapists to become “good” parents. (County Attorney, Minnesota)

Paramount interest should be protecting the children. (Other, Michigan)

The ultimate goal, the best interest of the child, achieved by knowing as much information as possible, clearly outweighs any prejudicial effect. (Assistant County Attorney, Texas)

Considering the unique purpose of the child welfare system and the vulnerable population that it serves, the best interest of the child is most effectively served when all the relevant information is available to all the professionals involved in the cases. Many prosecutors also reported that the flow and exchange of pertinent information is essential for the care and protection of children.

Complete information is the best way to enable children to be protected. (Deputy District Attorney, Wisconsin)

A full picture of what's going on is important—whether the information is usable or not. (Deputy District Attorney, Oregon)

It is important to have as much information as possible to protect the child. (District Attorney, Oregon)

Exchanging information and ideas is best for the child. (District Attorney, Texas)

Respondents to the NCJJ survey also indicated that the presence of procedural safeguards provided adequate protection for parents' rights in dependency proceedings. Indeed, respondents argued that procedural safeguards such as appointing counsel for parents, use immunity provisions, confidentiality provisions, and rules of ethics effectively address fairness concerns.

[Parents] accused of abuse do not lose [their] Constitutional rights just because they have civil and criminal proceedings occurring at the same time. They have the option of not providing incriminating information. (Other, Michigan)

Conflicts are not overly complex if rules of evidence and rules on privilege and confidentiality are known and observed by the attorney. (County Attorney, Minnesota)

It is not inappropriate for the same attorney to handle both roles (civil/criminal) provided safeguards exist to keep any confidential information out of the criminal court. (Deputy District Attorney, Utah)

A comprehensive discussion of these procedural safeguards and their importance in dependency proceedings would require considerable specialized in-depth research and thus is outside the scope of this article. However, a brief overview of such safeguards is necessary here because many prosecuting attorneys view these mechanisms as adequate protection for parents in dependency proceedings.

Negative Inference

Several states permit a parent who is called to testify in a civil dependency proceeding to invoke his or her Fifth Amendment right. The court is then permitted to infer that the testimony would have been adverse to the parent's position. Based on this negative inference, the court may adjudicate a child dependent and order treatment or services for the family. In this way, the court respects the parent's constitutional privilege against self-incrimination but protects the child and provides assistance to families.

Counsel for Parents

In almost every jurisdiction, a parent must be notified of his or her right to counsel and provided with counsel if he

or she is unable to afford it. Like many of these procedural safeguards, the appointment of counsel for parents constitutes a distinct topic for in-depth research and discussion, and, as such, it is beyond the scope of this paper. However, it is briefly mentioned here because so many respondents reported it in their survey responses.

From beginning to end, civil dependency proceedings implicate numerous important interests for parents.⁶⁹ Individuals have a fundamental right to the custody and care of their children. Agency involvement, state custody and court supervision directly impact the right to preserve the integrity of the family unit. Further, if criminal proceedings also result, a parent may confront a loss of liberty through incarceration. Thus, the need for counsel in civil dependency proceedings is essential. To adequately protect parents' rights and interests, it is imperative that an attorney be available to assist parents in understanding the nature of the proceedings, their rights under the law and the consequences of various legal directives.

Use Immunity

In addition, many states have instituted "use immunity" provisions, which prohibit the prosecuting attorney from using testimony obtained in dependency proceedings against a parent in a parallel criminal prosecution.⁷⁰ Importantly, in every decision found where a court has allowed a civil state intervention case and criminal proceedings to go forward simultaneously, the parent has been granted or has been assumed to be entitled to immunity to protect him or her from being forced to choose between the privilege and the opportunity to be heard.⁷¹

The benefits of immunity have been clearly emphasized in case law:

Without immunity, the parent is forced to choose between incriminating himself or having little chance to complete reunification with his child. The consequences flowing from this are severe. The dependency proceedings are not pursued for the purpose of marshaling evidence of guilt but are designed to facilitate reunification of the family and to assemble all relevant evidence for the court to make an informed disposition. The burden of the prosecution of proving the defendant guilty beyond a reasonable doubt in the criminal proceedings will be substantially lightened if allowed to take advantage of evidence from a dependency proceeding. If the parent continues to remain silent in the dependency proceeding on the issue of his intentional abuse, he not only loses his opportunity to present a convincing case for reunification in the dependency proceeding, but also risks that his position of silence on the issue is an indication that he is not cooperating in the reunification process. To force an individual to choose such unpalatable alternatives runs

counter to our historic aversion to cruelty reflected in the privilege against self-incrimination.⁷²

Confidentiality Provisions

Many states have confidentiality provisions that protect information between parents and treatment providers, especially mental health professionals. Although the number of states that provide an exception for the prosecuting attorney is growing,⁷³ many states have procedural mechanisms for obtaining that material, including requiring an in camera review by the juvenile court judge before release of dependency records.⁷⁴

COERCIVE POWER OF THE STATE

It is an unfortunate fact that some parents who commit crimes of abuse or neglect against their children will not cooperate with the child protection agency without a credible threat of criminal penalties.⁷⁵ Thus, in certain situations, the threat of criminal prosecution may be an effective way to compel parents to cooperate with services and treatment plans established by the child protection agency. In fact, sometimes even a simple warning can achieve substantial results.⁷⁶ Note Sprague and Hardin, "Criminal sanctions can be used not only to punish and deter the perpetrator, but also to protect the child and reinforce family rehabilitation."⁷⁷ For example, the filing of criminal charges may be used to encourage abusive parents to obtain needed treatment. Moreover, says Edwards, "[T]he fear of incarceration can be effectively used to insure compliance with rehabilitative orders."⁷⁸ Indeed, in some cases, the authority of the court may provide the only assurance the treatment is pursued.⁷⁹ Thus, actual and potential criminal proceedings may help protect the child from further harm by the perpetrator.⁸⁰

Criminal proceedings, or the threat of those proceedings, [are] a powerful motivation for the parent to comply with the case plan developed by the Department of Health and Welfare. (Prosecuting Attorney, Idaho)

It is more likely to achieve basic changes in a parent's mode of living where a probation agent (after criminal conviction) and a child welfare worker are able to form a working relationship than in those cases where there is a juvenile court order only. The probation agent has immediate enforcement powers that the juvenile court can exercise only after cumbersome contempt proceedings. When there is a working relationship between the criminal and juvenile systems, the child welfare worker can provide the services while the probation officer can demand compliance much more effectively. (Deputy District Attorney, Wisconsin)

However, there is a fine line between good-faith prosecution of criminal child abuse and an abuse of prosecuto-

rial discretion. Rule 3.8(a) of the ABA Model Rules of Professional Conduct, titled "Special Responsibilities of a Prosecutor," prohibits the prosecutor on a criminal case from prosecuting a charge that the prosecutor knows is not supported by probable cause.⁸¹ The comment to Rule 3.8 explains:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction varies in different jurisdictions.⁸²

Despite this obligation, such an approach may be appropriate in certain situations. Besharov notes:

Many police and prosecutors are tempted to file charges in the hope of "straightening out" the parent by the sobering experience of pre-trial arraignment and perhaps, pre-trial detention. And some police and prosecutors use the threat of potential charges to "encourage" the accused to seek out-of-court help or treatment. By this tactic, they hope to obtain at least some rehabilitative treatment for the juvenile. While one must question this practice, its reality must be kept in mind.⁸³

Similarly, Austin observes: "[W]hile the possibility of criminal prosecution by itself is not the solution to abuse, it is an important part of effective child abuse legislation."⁸⁴

EFFICIENT AND EFFECTIVE CASE PROCESSING

Professionals working in both the criminal justice system and the child welfare system consistently attempt to initiate, advance, and resolve cases efficiently and effectively. Advantages and disadvantages attach to each prosecutorial structure. When these two systems interact at the crossroads of criminal child abuse and neglect cases, these advantages and disadvantages become especially significant.

The Same Attorney Handles Both Civil and Criminal Proceedings

Numerous benefits accrue when the same attorney has both civil and criminal authority, assuming prosecutorial responsibility for both civil dependency proceedings and adult criminal violations. This structure has the potential to conserve tremendous resources in terms of time, energy, manpower, and supplies as well as to reduce delay in the processing of each respective case.

For example, potential witnesses, including child victims, will not be subjected to multiple interviews. This protects the child from additional trauma and lends credibility to his or her story. Likewise, with fewer entities

pursuing the same or similar information, there is less chance for loss or miscommunication of important information. In addition, all the necessary information regarding potential criminal liability for acts of child abuse or neglect is located in the same office under the supervision of one individual. Thus, there is no need to duplicate information in the child protection file for delivery to the criminal prosecuting attorney.

Having the same attorney do both cases insures better handling of each and guarantees coordination of the files. (County Attorney, Kansas)

If both proceedings are handled by the same attorney, then the child victims will not have to be re-interviewed by a different attorney and the child will be more secure and comfortable in the courtroom. (Deputy District Attorney, California)

This would seem to be a more efficient system, that would involve less duplication of efforts, a greater familiarity with all aspects of the case and more consistent results. (District Attorney, New York)

Furthermore, applying or utilizing certain prosecutorial methods in dependency proceedings may provide a benefit to the case. One legal scholar notes:

While the rehabilitative orientation of child protective proceedings should be preserved, it is a mistake to ignore, or deny, the essentially prosecutorial function of the attorneys who assist petitioners. First, the preparation and presentation of child abuse and child neglect cases often require hard-nosed prosecutorial methods. Field investigations, in cooperation with the police as well as the child protective agency, may be needed. Recalcitrant witnesses may have to be identified and pressured into telling what they know. Opposing witnesses may have to be cross-examined effectively. These are the functions, and the skills, of a prosecutor.⁸⁵

However, child welfare law is a complex legal specialty that requires familiarity and experience with the unique interdisciplinary concerns of the child welfare system.⁸⁶ An assortment of issues, such as child development, domestic violence, substance abuse, and mental health, suffuse the area of child welfare law. Also, unique evidentiary rules, different time frames, and distinct standards of proof govern child protection proceedings.⁸⁷

These are completely different types of cases which require different skills and abilities. (Deputy State's Attorney, Maryland)

Oftentimes, the fact that the prosecutor's office is involved in both proceedings facilitates prompt, appropriate resolution of both cases because dispositions can be coordinated through

plea bargaining and case settlement in both cases. (Other, Michigan)

Greater potential for the prosecutor to gain more evidence, eliminate duplication of effort, less stress on child witnesses, and greater chance for plea bargain short of trial. (Assistant Prosecuting Attorney, Michigan)

If the custodian is the perpetrator, a criminal conviction and sentence which incorporate the terms of the child protection order strengthen the protection order. (District Attorney, Wisconsin)

Because of varied expertise, training, and education, different individuals or agencies are better equipped to handle different responsibilities. (Other, Arizona)

Thus, when the same attorney prosecutes both the civil dependency proceeding and the related adult criminal proceeding, what is gained through the conservation of resources and the techniques of prosecutors may be lost through the lack of experience and specialization. To compound this difficulty, there is a high turnover rate for both prosecuting attorneys and child protective services agency attorneys. Donald Duquette, a distinguished legal scholar in the field of child welfare law, explains:

For many years, and continuing today in some jurisdictions, no attorney appeared on behalf of the social services agency or the individual that filed the petition alleging child abuse or neglect and seeking to protect a particular child from harm. In the recent past, if an attorney did appear in child protection cases, he or she was likely to be a young assistant prosecutor or assistant county corporation counsel with little preparation, time, limited experience in such cases, and little familiarity with either the juvenile court or child protection law. The child neglect attorney, if there was one, was often the staff member most recently hired by the county prosecutor's office. And the juvenile court was seen in those days as a good place for lawyers to get experience before moving up to bigger and more important cases in other courts.⁸⁸

Laver made similar observations in a recent series of articles on improving agency attorney practice: "[O]ften, the attorneys in these offices are new and choose to work in the prosecutor's office to practice criminal. They rotate out of dependency cases quickly, and therefore never get proper training."⁸⁹

These issues are significant in light of the powerful position that the agency attorney may occupy in child protection proceedings. Indeed, remark Hardin et al., "[T]he quality of justice in child protection cases is closely linked to the performance of government attorneys."⁹⁰

Most factual information in child protection cases is gathered by the agency, and that information is presented largely through the government attorney. In many

courts the government attorney largely controls what information is presented to the judge. It is the government, i.e., the public child protection agency, that takes most of the initiative in child protection cases, including removing children from their homes, filing petitions, recommending their return home, and seeking the termination of parental rights. Government attorneys should play a major role in these decisions, by determining whether there is a legal basis for the agency's action and counseling the agency on legal strategy.⁹¹

Furthermore, "[G]overnment attorneys have an important role in helping to guide agency employees in their handling of cases before and between court hearings."⁹²

Prosecuting attorneys who are involved in both proceedings may not be able to efficiently serve the interests involved, and one proceeding may ultimately take precedence over the other. Various states may therefore opt to enact specific legislation or court rules to prevent this result. For example, under the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings, civil protection proceedings are not to be delayed pending the status of any other proceedings. Rule 5 provides: "Under no circumstances shall a civil protection proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other proceeding, including, but not limited to, criminal proceedings."⁹³

Provisions like these reflect findings such as those of the West Virginia Supreme Court in *Matter of Taylor B.*, where the court held that "a civil child abuse and neglect petition initiated by the Department of Health and Human Resources is not subject to the terms of a plea bargain between a county criminal prosecutor and a criminal defendant in a related child abuse prosecution."⁹⁴ The court explained: "[C]ivil abuse and neglect proceedings focus directly upon the safety and well-being of the child and are not simply 'companion cases' to criminal prosecutions."⁹⁵

Such provisions create obstacles for prosecuting attorneys who are involved in both civil and criminal proceedings and who seek efficient methods of resolving both.

Different Attorneys in the Same Office Handle Civil and Criminal Proceedings

Similar advantages may accompany a prosecutorial structure where different attorneys within the same office prosecute the civil and criminal cases. There is less chance for duplication of services, inconsistent court orders, and miscommunication and misunderstanding between the parties and the court. The close proximity of the civil and criminal attorneys facilitates communication regarding the respective status of each case and provides them with regular opportunities to discuss aspects of each case that

may be relevant to the other proceeding. These aspects may include case history, case goals, current court orders, services, and treatment.

For example, the attorney prosecuting a civil dependency case may discover a parental drug abuse problem through information obtained by the criminal prosecutor. If the parent is not incarcerated or completes a short prison sentence, conditions of probation or parole could include cooperation with a social services plan that requires consistent participation in alcohol treatment.

In a number of jurisdictions the office of the prosecuting attorney contains divisions that prosecute the child welfare cases exclusively while another section of the office handles the adult criminal cases. This prosecutorial structure accommodates the specific legal knowledge and skills needed for operating in and accomplishing the goals of the child welfare system without sacrificing opportunities to communicate and coordinate proceedings where appropriate by closely aligning the attorneys.

Different Attorneys in Different Offices Handle Civil and Criminal Proceedings

These same advantages may also apply to a prosecutorial structure in which the prosecuting attorney prosecutes the adult criminal proceedings when the child abuse or neglect constitutes a crime but does not participate in civil dependency proceedings.⁹⁶ For example, although the prosecuting attorney should be aware of various child welfare and child protection issues, it is not essential that he or she develop two distinct sets of legal skills and knowledge in order to fulfill the role of prosecuting attorney. Likewise, although the attorney representing the interests of the state or the social services agency should have some knowledge of the adult criminal justice system, it is not necessary that he or she be versed in criminal law in order to be an effective advocate in dependency proceedings.

As indicated previously, the different rules of evidence, rules of discovery, standards of proof, and time restrictions that govern criminal and civil proceedings create a significant hurdle for attorneys. Both types of proceedings require specific evidence to support the contentions offered by the prosecuting or agency attorney. If different entities have jurisdiction over each type of proceeding, the attorney does not face the daunting task of preparing and presenting two distinct cases.

However, one criticism raised by commentators to the Juvenile Justice Standards, a multivolume set published by the Institute of Judicial Administration and the American Bar Association, is that "the current, overlapping regime of child protective and penal laws itself has a particularly exacerbating quality: each system is controlled by different personnel with different perspectives, and each system

too readily may be invoked, without attention to the consequences for the other.”⁹⁷ Agency attorneys in civil dependency proceedings may submit agency recommendations that are agreed to by all the parties, that involve parents in therapy and services, and that contain specific instructions regarding visits with the child or children. However, if the criminal prosecutor is seeking incarceration of the offending parent, the actions of the judge and prosecutor in the criminal court may make much of the agency’s plan unworkable.⁹⁸

Thus, “it is necessary to have coordination and communication between the various decision makers in the juvenile and criminal courts concerning the disposition of child abuse cases.”⁹⁹ Indeed, cooperative efforts are essential to the effective and appropriate resolution of both types of proceedings. Sprague and Hardin recently described the important connection:

Criminal court information regarding incarceration, pretrial release conditions, plea bargain terms, sentencing terms, and treatment is directly relevant to the safety, and therefore, the placement, of the child and services offered pursuant to the juvenile court case plan. In turn, the juvenile court case plan, reports, court orders, child placement, and general status of the proceeding may be relevant to setting pretrial release conditions, sentencing terms, and treatment requirements.¹⁰⁰

In order to fully serve the best interest of the child, decision-makers in the criminal courts must be aware of the status of the case in the juvenile court so they may ensure that respective court orders are not contrary or inconsistent with one another.¹⁰¹ If properly informed of relevant information from the dependency case, the criminal court can assist the entire case by reinforcing or bolstering the order of the juvenile court.¹⁰² Edwards provides this illustration:

For example, the judge who hears the offending parent’s motion for bail reduction or for release on his own recognizance should be aware of the agreements reached between the police, the CPS workers, the juvenile court and the family regarding placement of the child pending disposition of the case. If the juvenile court is satisfied with the family placement, and if the criminal court is otherwise satisfied that release is appropriate, that court can be helpful to the entire case by releasing the parent with specific instructions, such as a no contact order.¹⁰³

Therefore, it is clear, say Sprague and Hardin, that “a good working relationship between the criminal prosecutor and the agency attorney contributes to the successful prosecution of both criminal and juvenile court proceedings.”¹⁰⁴ A number of respondents to the NCJJ survey emphasized this point.

An effective cooperative relationship maximizes protection of the child and serves justice and due process. (Assistant District Attorney, Pennsylvania)

The key to balancing the criminal and civil end of child abuse and neglect cases is to get the agencies talking and cooperating with one another. (Deputy County Prosecuting Attorney, Idaho)

Methods of Coordination and Cooperation Between Civil and Criminal Child Abuse Proceedings

There are a number of ways in which professionals in both proceedings can successfully coordinate civil and criminal proceedings, maximizing the utility of each proceeding while minimizing the difficulties described in the preceding sections. Communication, both formal and informal, between the professionals involved is essential. Attendance and participation in case conferences or staff meetings provide opportunities for exchanging information about the status of cases and the court directives currently in force, thereby reducing the likelihood of inconsistent court orders.

Such meetings also provide opportunities for child protective services, law enforcement, prosecuting attorneys, and medical personnel to discuss issues related to cases and offer interdisciplinary input ensuring not only that necessary and appropriate services are in place, but also that important information is available to all the professionals involved with the case. However, coordination and cooperation of court proceedings should not be limited to parallel cases of child abuse and neglect but rather should be a regular occurrence in all child protection proceedings,¹⁰⁵ including initial reports and investigations. As Phipps observes, “Child abuse cases involve legal, social and psychological issues that must be addressed by a variety of professionals ranging from prosecutors and law enforcement personnel to child protection workers, psychologists and physicians.”¹⁰⁶ Thus, “legislation passed throughout the past 10 years has recognized the crucial role multidisciplinary teams play in the prompt and thorough investigation and prosecution of criminal child abuse and neglect.”¹⁰⁷

Currently, 30 states have legislation mandating the establishment of multidisciplinary teams, 11 states have legislation permitting the establishment of such teams, 6 states have no legislation regarding multidisciplinary teams, and 3 states use regulations and directives within the local child protection agency.¹⁰⁸

Untalan and Mills note that “[l]iterature on the use of multidisciplinary teams in child abuse and neglect shows the effectiveness of this approach in addressing the myriad of issues related to child protection.”¹⁰⁹ Moreover, a

recent study by Kolbo and Strong found that an increasing number of child welfare professionals are recognizing multidisciplinary teams as a valuable and viable method of ensuring that child abuse and neglect victims are not subjected to additional systemic harm.¹¹⁰

Multidisciplinary teams are organized for the purpose of coordinating child protection investigations and proceedings.¹¹¹ Such teams may be responsible for a number of activities, including "investigation of reported cases, treatment planning, provision of direct service to victims, advising and consultation for prosecution decisions and treatment planning, community education, monitoring of case resolution, or social planning to identify gaps in the service delivery system."¹¹²

Kolbo and Strong also report that "respondents identified the investigation of reported cases, treatment planning, and advising and consultation as the most common functions."¹¹³ Kolbo and Strong found that individuals involved in law enforcement and other legal services have assumed greater roles in multidisciplinary teams than professionals in mental health, health care, and education.¹¹⁴

A major focus of the multidisciplinary team should be the coordination of proceedings.

Case-specific team goals might include (1) interagency and interprofessional cooperation; (2) case management coordination; (3) evidence gathering for both proceedings; (4) minimizing the number of victim interviews; (5) treatment program coordination; (6) training skilled professional victim interviewers; and (7) developing priorities for addressing an individual case.¹¹⁵

Such collaboration helps reduce duplicate efforts to gather and review relevant information, which in turn may reduce the trauma to children and increase the credibility and accuracy of case information. As Kolbo and Strong report:

A broader range of viewpoints on problems is considered in the decision-making process, more decisions are made jointly, otherwise unknown resources are identified, and ultimately, better assessments, treatment plans, and services are provided. In addition, more cases are actually reviewed, fewer cases "fall through the cracks," and more cases reach successful resolution.¹¹⁶

Many respondents to the NCJJ survey offered similar positive remarks about the benefits of participating in multidisciplinary teams. For example, one respondent replied:

The key to balancing the criminal and civil end of child abuse and neglect cases is to get the agencies talking and cooperating with one another. Interdisciplinary team meetings have really helped iron out the concerns of each agency as the cases progress, and on a weekly basis. Each agency can hear the concerns of the other agencies and learn to recognize

the limits and motives of each of the agencies involved.
(Deputy County Prosecuting Attorney, Idaho)

Participation on a multidisciplinary team also has the additional, though less obvious benefit of education for attorneys, observes Bross.¹¹⁷ "Since child development, pediatrics, social work, and psychiatry and psychology are not taught in law school, most attorneys know little about children, poverty, or abuse and neglect."¹¹⁸ Thus, "an extended tenure on a child protection team provides the best possible education about children and parents."¹¹⁹

Effective Coordination of Court Proceedings: The San Diego Case Study

A 1993 national survey sponsored by the National Center on Child Abuse and Neglect revealed that although more incidents of child physical abuse than child sexual abuse are reported annually, prosecuting attorneys' offices prosecute far fewer cases of child physical abuse annually.¹²⁰ To evaluate this situation, the National Institute of Justice and the Office of Juvenile Justice and Delinquency Prevention sponsored a study of one San Diego prosecutor's office that aggressively pursues child physical abuse and neglect cases through coordination with other agencies and the use of specialized staff.¹²¹ In the six-year period from 1986 to 1992, the prosecutor's office averaged an 85 percent felony conviction rate for cases of serious child physical abuse and neglect.¹²²

San Diego's multiagency approach involves coordination among child protective services, the police, the medical community, and the prosecutor's office.¹²³ The San Diego District Attorney's office contains a specialized unit, called the "Family Protection Unit," for the prosecution of child abuse and neglect.¹²⁴ Moreover, the Child Protection Center at San Diego's Children's Hospital and child protective services department cohost a weekly meeting for representatives from the police department, child protective services, the district attorney's office, and the health and medical community to discuss problematic cases and share expertise.¹²⁵

The study illustrates the need for prosecutors to communicate to law enforcement and child protective services their willingness to pursue prosecutions for child physical abuse when appropriate.¹²⁶ Researchers offered a number of valuable recommendations designed to facilitate such communication—for example, increased referral of child abuse and neglect cases to prosecutors for review; greater coordination in response by child protective services, police, medical personnel, and prosecutors; specialization and training for law enforcement and prosecutors; and increased public awareness and education regarding the nature of child abuse and neglect.¹²⁷

SPECIAL CONCERNS FOR PROSECUTING ATTORNEYS WHO ALSO REPRESENT THE AGENCY IN CIVIL DEPENDENCY PROCEEDINGS

Potential for significant confusion exists regarding a precise definition of the client and a comprehensive understanding of the interests when the prosecuting attorney represents a party in dependency proceedings. "Within each model," Laver observes, "the view of who the client is differs. Some represent the agency as an entity, relying on the caseworker's opinions, but keeping the interests of the agency in mind at all times, and some, as in the prosecutor model, represent the 'people.'"¹²⁸ Defining the client is important because "many conflicts between attorney and social workers stem from a misunderstanding of who the attorney represents."¹²⁹

Considerable ambiguity exists in the statutory language, and case law has only just recently begun to address the issue of the relationship between the social services agency caseworker and the prosecuting attorney. The State of West Virginia provides an excellent case study for the issue of defining the client and clarifying the interests being represented. In fact, the West Virginia Court Improvement Oversight Board made specific findings on these issues with respect to the prosecuting attorney in 1996:

In the broad perspective, the prosecutor's role is to represent the "State's interests in the safety and well being of any child suspected to be at-risk." In this role the prosecutor has an important function in assisting the petitioner, normally DHHR [Department of Health and Human Resources] employees, in the preparation and handling of cases brought before the court. The basic concern of the Oversight Board with respect to the role of the prosecutors in this State is the absence of a clear definition relating to who they represent in court in these abuse and neglect cases.¹³⁰

To understand the concerns of the West Virginia Court Improvement Oversight Board, it is necessary to review the relevant state statutory provisions. The West Virginia Code specifically requires the prosecuting attorney to cooperate with persons seeking relief in cases of suspected child abuse; to assist such persons in the preparation of applications and petitions; to investigate reported cases of suspected child abuse and neglect for possible criminal activity; and to report annually to the grand jury regarding the discharge of these duties.¹³¹ Thus, although the prosecuting attorney represents the interests of the state in civil matters, the law regarding the role of the prosecuting attorney in dependency proceedings specifically mandates that the prosecuting attorney represent the petitioner.¹³²

In West Virginia, the petitioner is often the Department of Health and Human Resources. In such cases, the code requires that the prosecuting attorney represent the department: "The prosecuting attorney shall render to the state department of welfare [division of human services], without additional compensation, such legal services as the department may require."¹³³

However, as the next subsection illustrates, conflict between the prosecuting attorney and the social services agency can potentially arise when they disagree about appropriate case recommendations and resolution.

CONFLICT WITH THE CHILD WELFARE AGENCY

An agency attorney must be mindful of both the policies of the agency and the viewpoints of individual caseworkers. When the two positions are in conflict, caseworkers may feel that their professional judgments and recommendations are not zealously represented in court.¹³⁴

As Laver notes, "several concerns about the prosecutor model make this method of representation particularly problematic."¹³⁵ For example, "with this method the attorneys generally get the final word on whether a petition should be filed. ... [T]his leaves the caseworker feeling as if her professional opinion is not considered."¹³⁶ In addition, "[C]aseworkers may also fear that with attorneys making decisions about the caseworkers' clients, best social work practice will be ignored."¹³⁷

The Supreme Court of West Virginia has recently addressed the relationship between the prosecuting attorney and DHHR. In *In re Jonathan G.*, DHHR and the prosecuting attorney disagreed over the appropriate disposition of the case: "[T]he prosecutor apparently believed that reunification was possible, whereas DHHR fervently believed that termination of parental rights was in Jonathan G.'s best interests."¹³⁸

Perceiving a potential conflict of interest, the prosecuting attorney requested that the Attorney General become involved by representing DHHR. However, following the appearance of an attorney from the Attorney General's office, the prosecuting attorney continued to actively participate in the proceedings, representing the interests of the state.¹³⁹ The court phrased the issue as follows: "[S]hould the role of the prosecutor be comparable to her role in criminal proceedings, requiring her to independently weigh the evidence before proceeding on a complaint, or should it be that of a traditional lawyer-client relationship, requiring her to present evidence in accord with the client's wishes within confines of the law?"¹⁴⁰

In formulating its response, the court considered section 49-7-26 of the West Virginia Code, which states that

"the prosecuting attorney shall render to the state department of welfare [division of human services], without additional compensation, such legal services as the department may require."¹⁴¹ The court opined, "This statutory provision supports the view that the prosecuting attorney stands in the traditional role of a lawyer when representing DHHR in connection with abuse and neglect proceedings."¹⁴² The court concluded that such an attorney-client relationship precluded the prosecuting attorney from independently formulating or advocating positions separate from DHHR in abuse and neglect proceedings.¹⁴³ However, in a footnote, the court acknowledged that this relationship creates a conflict for the prosecuting attorney:

[T]he same statute that directs the prosecutor to assist in the prosecution of child abuse and neglect laws also authorizes the prosecutor "to investigate reported cases of suspected child abuse and neglect for possible criminal activity. "These investigatory and enforcement rights are clearly outside the scope of the traditional attorney-client relationship. Thus, the prosecutor ... clearly has a dual role in the area of civil/criminal abuse and neglect cases that requires him or her to provide representation to those seeking to file child abuse and neglect complaints and also to investigate and enforce child abuse and neglect laws of this State."¹⁴⁴

Despite recognizing this conflict, one year later the West Virginia Supreme Court decided *State ex rel. Diva P. v. Kaufman*. The court, reiterating the holding of *In re Jonathan G.*, further held that the representation continued even if the prosecutor believed that the recommendations of the department were contrary to the best interest of the child.¹⁴⁵

In *Diva P.*, the prosecuting attorney representing DHHR disagreed with the agency's recommendations regarding the disposition of the child, Diva P., and appealed the order entered by the circuit court, which was based on the recommendation of DHHR. The Supreme Court considered the issue in light of its recent decision in *In re Jonathan G.* and concluded that the prosecuting attorney could not appeal a decision based on the agency's recommendations without the express consent and approval of DHHR.

In its opinion, the Supreme Court stated:

In civil abuse and neglect cases, the legislature has made DHHR the state's representative. In litigations that are conducted under State civil abuse and neglect statutes, DHHR is the client of county prosecutors. The legislature has indicated through W. Va. Code § 49-6-10 (1996) that prosecutors must cooperate with DHHR's efforts to pursue civil abuse and neglect actions. The relationship between DHHR and the county prosecutors under the statute is a pure attorney-client relationship. The legislature has not given authority to county prosecutors to lit-

igate civil abuse and neglect actions independent of DHHR. Such authority is granted to prosecutors only under State criminal abuse and neglect statutes. Therefore, all of the legal and ethical principles that govern the attorney-client relationship in general, are applicable to the relationship that exists between DHHR and county prosecutors in civil abuse and neglect proceedings.¹⁴⁶

Therefore, the prosecuting attorney is prohibited from advocating a position that is separate from or contrary to that of DHHR.¹⁴⁷ Clearly, for prosecutors in West Virginia, there is a great potential for interprofessional and personal conflict.

RECENT RESEARCH PROJECTS REGARDING REPRESENTATION

Two recent research projects in Michigan and Florida have attempted to examine and address a significant number of the aforementioned issues relating to legal representation in child protection proceedings and the prosecuting attorney's involvement. Although each project emphasizes selected issues, both nonetheless provide immensely valuable and informative illustrations of the role of the prosecuting attorney in child protection proceedings.

MICHIGAN: THE CHILD ADVOCACY LAW CLINIC

In 1989, the Child Advocacy Law Clinic at the University of Michigan Law School conducted a federal grant project to achieve timely permanence decisions for dependent children by improving the legal representation provided to the social welfare agency in civil child protection proceedings.¹⁴⁸ Clinic faculty and law students were deeply concerned about the substantial harm being inflicted on children by the drawn-out proceedings that were so common in the most serious cases of child abuse and neglect.¹⁴⁹

Clinic participants also observed many examples of delayed court proceedings that were "directly or indirectly attributable to the legal representation provided to DSS by the local prosecutors' offices."¹⁵⁰ In particular, prosecutors failed to appear at court hearings beyond initial trials and termination of parental rights hearings if DSS recommended to terminate parental rights.¹⁵¹

Clinic members also observed a lack of active legal consultation provided to DSS. For example, "it often was obvious that the prosecutor had not talked to the DSS social worker or looked at the case file prior to the day of the court proceeding."¹⁵² In addition, "prosecutors actually undermined the social worker's position in some cases" by either refusing to pursue petitions that they felt were too difficult to prove or negotiating with opposing counsel to strike portions of the petition in return for a no-contest

plea, thus eliminating the need for a trial.¹⁵³ “These amendments to the petition were sometimes made over the objections of the social worker and without considering the effect such amendments could later have on achieving permanence for a child or effective treatment for a parent.”¹⁵⁴

However, clinic participants also noted a number of reasons for the lack of effective legal representation being provided to DSS. Limited resources are available to the office of the prosecuting attorney as a whole, and the bulk of those resources are allocated to criminal prosecutions.¹⁵⁵ The attitude, training level, and inexperience of the assistant prosecutors assigned to juvenile dependency matters compound this lack of resources.¹⁵⁶ Finally, the prosecutors’ perception of their role as representatives of the state’s interests fostered the attitude that DSS social workers are not truly clients but merely witnesses or investigating officers.¹⁵⁷ Thus, the project hypothesized “that many delays in achieving a permanency decision for a child placed by the courts in temporary foster care can be reduced significantly by employing a private model of legal representation, rather than the public model of legal representation currently used in most jurisdictions.”¹⁵⁸ In other words, “permanency for children could be achieved much more effectively under an alternative to the public model of legal representation for DSS.”¹⁵⁹

The project distinguished the “public model” from the “private model” based on the type of attorney providing legal representation to DSS. In the public model, the county prosecuting attorney represents DSS during dependency proceedings, while in the “private model,” the project attorney represents the agency. Most importantly, though, “this private model would apply the ethical rule and duties applicable in the usual private client/attorney relationship.”¹⁶⁰ This meant that the project attorney would “be available at all times to provide legal consultation to the social worker clients”;¹⁶¹ “follow the social worker’s goals in the case”;¹⁶² “accompany the social worker to the preliminary hearing, the pretrial and trial, the dispositional hearing, the review hearings, the permanency hearing and the TPR [Termination of parental rights severs the legal relationship between the parents and child]”;¹⁶³ and “consult and meet with social worker clients beyond court appearances.”¹⁶⁴

Project attorneys received training in various areas outside the law, including psychiatry, social work, and pediatrics, and learned basic concepts of child development, causes and symptoms of abuse and neglect, a child’s need for a permanent family home, and available family services.¹⁶⁵ Project coordinators felt that such training was necessary “so that the attorney could effectively communicate with the social workers and could provide the

insight needed to counsel them on developing and implementing a case plan.”¹⁶⁶ As the project summary states:

The importance of this interdisciplinary training cannot be overemphasized. The agency attorney must have this background to be able to provide the counseling, support and zealous advocacy required by the private model of legal representation. If the attorney is to help the social worker to make a timely permanency decision, the attorney must speak the language of the social worker and must have the basic knowledge required to assist in developing and assessing the social worker’s case plan.¹⁶⁷

Two major products emerged from Child Advocacy Law Clinic research project: a comprehensive analysis of objective and subjective data gathered from attorneys and social workers in the project courts and a training manual for attorneys representing the state agency in child abuse and neglect matters under the private model of legal representation.¹⁶⁸ The data generated by the research project were analyzed and the results published in a 1993 article in the *University of Toledo Law Review*.¹⁶⁹

In a detailed discussion of the project, the article addresses and reiterates a number of the issues presented by this article, including the special concerns identified for prosecuting attorneys who are involved in both civil dependency and criminal prosecution proceedings. Consider the following example:

Beyond these observed shortcomings of agency social work practice and agency legal representation that impacted directly on children, the Clinic students and attorneys observed subtle dynamics within the juvenile court system that were worrisome. It has been well documented that there is a deep, inherent conflict between the fields of social work and law and between social workers and attorneys. Social workers and the agency utilize conciliatory methods, working with the client in a cooperative effort to achieve goals and solve problems for the individuals and families. In contrast, attorneys and the courts utilize the adversarial process to find the truth, to resolve disputes and to make decisions concerning the parties involved in civil child protection proceedings.¹⁷⁰

The study recognized the distinct perspectives and objectives of the child welfare and criminal justice systems and notes the unfortunate potential result: “This stark difference in approach to resolving problems of individuals and families in the child welfare system leads to a substantial degree of misunderstanding and miscommunication.”¹⁷¹

FLORIDA

Another pilot project began in Florida in 1995 to examine similar issues regarding legal representation for the social services agency, the Department of Children and

Families.¹⁷² To fully understand and appreciate the initiative for the project requires a brief background discussion.

Prior to 1989, the state's attorney represented the Department of Health and Rehabilitative Services in court. However, the state's attorney became involved only in contested cases and proceedings to terminate parental rights. Otherwise, caseworkers were filing motions, appearing in court, and presenting evidence without assistance from the state's attorney.

Concerned by the caseworkers' quasi-legal role, the Department of Health and Rehabilitative Services (HRS) petitioned the Florida Bar Standing Committee on the Unlicensed Practice of Law for an advisory opinion on the following issue: "Is the preparation of documents by lay counselors and the presentation of noncontested dependency court cases by lay counselors, including the filing of the documents, presentation of the case, request for relief and testimony of counselors the unauthorized practice of law?"¹⁷³

The bar committee found that "HRS lay counselors are engaged in the unauthorized practice of law by drafting pleadings and legally binding agreements, and representing another in court."¹⁷⁴ The Florida Supreme Court reviewed the recommendations of the bar committee but ordered the creation of an ad hoc committee under the supreme court to study the problem and make recommendations to the court. The court explained its decision as follows:

While we agree with the Committee that HRS lay counselors are engaged in the unauthorized practice of law, we are not convinced that such practice is the cause of the alleged harm, or that enjoining this practice is the most effective solution to this complex problem.¹⁷⁵

Approximately 15 months later, the Florida Supreme Court reviewed the report and recommendations of the Supreme Court Committee on Health and Rehabilitative Services Nonlawyer Counselors.¹⁷⁶ The Supreme Court committee determined that insufficient involvement by lawyers in the juvenile process contributed in part to the problems within the juvenile dependency system.¹⁷⁷ Moreover, the committee recommended a requirement that an attorney supervise the preparation of and sign all legal documents and that an attorney be present at all court proceedings.¹⁷⁸

Based on these recommendations, the Supreme Court held: "[A]dequate legal representation on behalf of HRS is required at every stage of juvenile dependency proceedings conducted pursuant to part III, chapter 39, Florida Statutes (1987)."¹⁷⁹

One Florida state's attorney prosecutor suggested potential difficulties in this new arrangement for legal representation of the Department of Children and Families by

the state's attorney.¹⁸⁰ Before 1989, the state's attorney presented dependency cases and had discretion to decide case goals and recommendations. Under the present structure the state's attorney represents the department and must follow any lawful directives of the department caseworker. This represents a significant departure from prior years. Unfortunately, the bureaucratic nature of the Department of Children and Families makes it challenging for caseworkers to be able to deliver necessary evidence and information in a timely manner to the state's attorney.

The state's attorney also reported as a source of frustration the lack of a clear definition of the client and confusion regarding which individual within the department is represented by the state's attorney: the caseworker, his or her supervisor, or the head of the department. Although the Department of Children and Families provides policy and procedure manuals, the state's attorney is legal counsel for the department but not a department employee, so such policy readers do not apply.

Finally, state's attorneys may still encounter conflicts of interest. For example, there is a conflict when the recommendations of the Department of Children and Families conflict with the goals of the state's attorney prosecuting a parallel criminal case. Also, if a parent is a witness in another unrelated case, the state's attorney cannot claim the parent is a credible witness for purposes of the unrelated case and then suggest that he or she is an unfit parent in the dependency case. Finally, if the state's attorney argues in good faith against the recommendations of the Department of Children and Families, then the state's attorney has a conflict of interest.

However, there is a resolution for such conflicts available to the state's attorney. Prior to transferring jurisdiction for representation for the department to the state's attorney, the department had 11 attorneys as in-house counsel. When jurisdiction was transferred to the state's attorney, the department relocated only 10 attorneys and maintained 1 attorney as a conflict attorney in the department. Thus, in the event of situations such as those described above, the case may be assigned to the conflict attorney who remains with the department.

The same solution is available when parallel criminal proceedings are pending and the criminal and the civil state's attorneys disagree on an appropriate resolution of either case. Otherwise, the two attorneys communicate regularly in order to update each other on the status of each case.

FINDINGS AND IMPLICATIONS OF THE NCJJ SURVEY

It is essential that attorneys in both civil and criminal child protection proceedings have experience in their

respective fields. As discussed in prior sections, such specialization directly affects the timely and appropriate processing of both cases, in and out of the courtroom.

The NCJJ survey results suggest that practitioners appreciate the difficulty of the choice between prosecutorial models. When asked whether the prosecuting attorney should be involved in both civil and criminal proceedings, respondents were fairly evenly divided in their opinions.

The survey results also suggest that practitioners recognize the complexity of the issue of the role of the prosecuting attorney. Respondents' reasons for their answers to the question regarding the appropriate role of the prosecuting attorney in child protection proceedings seemed to fall naturally into general categories.¹⁸¹ See Table 2 for a summary of responses to the NCJJ survey. See Appendix for a copy of the survey questionnaire.

Table 2. Summary of NCJJ Survey Responses

Question: Do you think that the same attorney should be involved in both dependency proceedings and adult criminal prosecutions?

	TOTAL	Yes	No	No Answer
TOTAL	255	103	111	41
Judges	14	4	7	3
Prosecuting Attorneys	203	91	85	27
Agency Attorneys	19	4	11	4
Other	19	4	8	7
If yes, why?				
Context of Protecting Children			46	
Efficient & Effective Case Processing			48	
Accountability			13	
Procedural Safeguards			20	
If no, why not?				
Fundamental Philosophical Differences			68	
Efficient & Effective Case Processing			29	
Fairness			14	
Potential to Undermine Reunification Efforts			11	

Source: NCJJ Survey, Fall 1998.

Note: The first group of numbers correspond to the number of surveys. However, the second group of numbers reflect the number of times that respondents offered a particular reason for their opinion. Respondents frequently cited more than one reason for their answer.

When these preliminary results are considered in the context of the preceding discussion, the case for a prosecutorial model in which different attorneys handle civil and criminal child abuse and neglect proceedings begins to emerge. First, overall, more respondents answered no than yes to the survey question about whether the same attorney should be involved in both civil and criminal child abuse proceedings. The pattern was repeated for every respondent group except the prosecuting attorneys. Second, for those respondents who answered no, the reasons most frequently cited concerned the fundamental philosophical differences between the child welfare system and the criminal justice system. The next most frequently reported category of reasons was efficient and effective case processing, which is undermined when prosecutors lack experience or knowledge of child protection. Thus, it seems that the most appropriate prosecutorial model may be one in which different attorneys handle civil and criminal proceedings and that emphasizes cooperation, coordination, and communication between the various professionals.

Clearly, more formal, in-depth research on these issues is needed before significant conclusions can be drawn. However, these initial results are very important because they represent the practical knowledge and experience of a variety of professionals able to offer valuable insight into the reality of the law.

CONCLUSION

The significance of the role of the prosecuting attorney in dependency proceedings cannot be overstated. Furthermore, the tension between the roles of a prosecuting attorney in a criminal case and that of a state's attorney in a civil dependency proceeding is clear. Decisions relating to the initiation and prosecution of parallel criminal cases against parents will very likely influence the effective and appropriate resolution of dependency proceedings. For this reason, more comprehensive research on the subject would be appropriate and immensely valuable to present and future efforts to improve the function and performance of the child welfare system.

1. See generally Gene D. Sarkin, *The Role of the Child Protective Agency's Attorney in Family Court Child Protective Proceedings*, 171 Practicing L. Inst./Crim. L. 431 (Mar. 1995); Donald N. Duquette, *Independent Representation of Children in Protection Proceedings*, in *The State as Parent 9* (Joe Hudson & Burt Galaway eds., International Research Perspectives on Interventions With Young Persons (NATO) Asi Series D, Behavioral & Social Sciences,

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vol. 53, 1989); Donald N. Duquette, *Lawyers' Roles in Child Protection*, in *The Battered Child* 460 (Mary Edna Helfer et al. eds., University of Chicago Press, 5th rev. ed., 1997); Jacob Isaacs, *The Role of the Lawyer in Child Abuse Cases*, in *Helping the Battered Child and His Family* 225 (C. Henry Kempe & Ray Helfer eds., 1972); Mark Hardin, *Families, Children, and the Law*, in *A Handbook of Child Welfare: Context, Knowledge and Practice* 213 (Joan Laird & Ann Hartman eds., Free Press 1985); American Bar Ass'n, *Lawyers for Children* (ABA Center on Children and the Law 1990); Gary Solomon, *The Role and Ethical Responsibilities of the Law Guardian*, 171 *Practicing L. Inst./Crim. L.* 501 (Mar. 1995); West Virginia Court Improvement Oversight Board, *Court Performance in Child Abuse and Neglect Cases: Assessment Report and Improvement Plan* 58 (Supreme Court Administrative Office, W. Va., July 18, 1996) (describing the essential roles performed by prosecutors, parents' attorneys, children's attorneys, and CASA volunteers throughout abuse and neglect cases; the responsibilities of each group with respect to their particular clients; and the importance of each advocate to the judicial process: "Each of these advocacy roles carries with it the commonly shared responsibilities to serve their respective client interests by: a) being adequately trained in the law and knowledgeable in their roles; b) devoting sufficient time and effort in case investigation, preparation and resolution; and actively taking part in every hearing and case review directly or indirectly involving their client. At the same time, each of these advocacy roles contributes a different perspective to the case in conjunction with protecting their client's interest. The ability of the judge to carry out the court's neutral role, as an informed decision-maker, is to a large degree a function of how well these advocates collectively and individually perform their obligations.")

2. See, e.g., Theodore P. Cross et al., *The Criminal Justice System and Child Placement in Child Sexual Abuse Cases*, in 4 *Child Maltreatment* 32-44 (Feb. 1999). Cross et al. conducted a study that examined the relationship between declining to prosecute child sexual abuse and child placement and found that one of the strongest indicators of child placement in child sexual abuse cases is the decision to criminally prosecute.

3. See, e.g., Hunter Hurst, Jr., et al., *Pennsylvania Court Improvement Project Final Report* 151 (National Center for Juvenile Justice 1998): "The qualifications, training and experience of attorneys responsible for the prosecution of dependency cases varies widely in Pennsylvania and was a particular issue of concern among interview respondents in Philadelphia and Allegheny

Counties. Interview data also suggest that some conflict and confusion exists among prosecutors and agency officials with regard to the proper role of prosecutors for dependency cases in the Commonwealth. Specifically, where county law departments assign solicitors to prosecute the cases, questions arise as to whether they represent the interests of the county and the state to protect children from neglect and abuse or do they represent the child protection agency? If the former, what is the legal standing of the caseworker in a child protection proceeding?"

4. Between September 1998 and February 1999 the National Center for Juvenile Justice conducted an informal exploratory survey of prosecuting attorneys, agency attorneys, judges, and other child welfare professionals as part of a research project on the role of the prosecuting attorney in civil child abuse and neglect cases. The primary source of survey recipients was the *1998 National Directory of Prosecuting Attorneys*, published annually by the National District Attorneys Association. Questionnaires were sent to prosecuting attorneys in each state, randomly selected from the directory, from both urban and rural jurisdictions. Other sources include the 1997 (Fall edition) *Membership Directory of the National Council of Juvenile and Family Court Judges* and the 1998 *National Directory of Children, Youth and Family Services*. In addition, numerous respondents in each group returned surveys containing suggestions for additional contacts. Follow-up telephone calls were conducted when necessary to clarify information. Approximately 700 surveys were mailed, and 255 surveys were returned from the following groups of participants: prosecuting attorneys, 203; agency attorneys, 19; judges, 14; and other, 19.

5. 27 C.J.S. *District & Pros. Att'ys* § 10 (1976).

6. Child Abuse and Neglect Statistics, National Committee to Prevent Child Abuse 1 (Apr. 1998) www.childabuse.org/facts97.html (citing C.T. Wang & D. Daro, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1997 Annual Fifty State Survey* (National Committee to Prevent Child Abuse 1998)).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Richard P. Barth, Ph.D., *The Juvenile Court and Dependency Cases*, 6 *The Future of Children* 100, 101 (Winter 1996).

12. Marcia Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Pro-*

ceedings, 35 U. Louisville J. Fam. L. 239, 242 (Spring 1996).

13. *Id.* at 245.

14. Sprague & Hardin, *supra* note 12, at 243.

15. Barth, *supra* note 11, at 100.

16. *Id.* at 102.

17. *Id.*

18. Debra Whitcomb & Mark Hardin, *Coordinating Criminal and Juvenile Court Proceedings in Child Maltreatment Cases*, in Nat'l Inst. Just. Res. Preview 1 (U.S. Dep't of Justice, Oct. 1996).

19. *Id.*

20. *Id.*

21. Sprague & Hardin, *supra* note 12, at 242.

22. Douglas Besharov, *The "Civil" Prosecution of Child Abuse and Neglect*, 6 Vt. L. Rev. 403 (1981): "The increase in the number and formality of court proceedings has led a growing number of states to provide attorneys to assist petitioners in the preparation and presentation of cases. In a few states, legislation requires the presence of an attorney to assist the petitioner. Such statutes generally require that an attorney be provided by a local public law officer, either the local criminal court prosecutor or the local county attorney or corporation counsel. In other states, the law merely provides that the judge may request the local public law official to assist the petitioner. In states where the law is silent on the subject, counsel is often made available through administrative arrangements with a local public law office, either criminal or civil. Occasionally, the local child protective agency uses its own internal legal staff or hires outside counsel to represent its workers."

23. *See, e.g.*, Ark. Code Ann. § 20-82-206 (Michie 1991); Cal. Welf. & Inst. Code § 18961.5(d) (West Supp. 1990); Conn. Gen. Stat. Ann. § 17a-106a (West 1992); Okla. Stat. Ann. tit. 10, § 7110 (West 1998); W. Va. Code § 49-5D-2 (Lexis 1998).

24. William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 Ga. L. Rev. 473, 521, n.222 (Spring 1990). *See also, e.g.*, Cal. Welf. & Inst. Code § 827(a) (West Supp. 1990); Colo. Rev. Stat. § 19-3-207 (Supp. 1989); Ky. Rev. Stat. Ann. §§ 625.080(1) and 625.100(2) (Banks-Baldwin 1987); Neb. Rev. Stat. §§ 43-2, 108(2) and (3) (1988).

25. *E.g.*, 1st Judicial Circuit, Alabama; Story County, Iowa; Sumner County, Kansas; Madison County, Ken-

tucky; 14th Judicial District, Louisiana; Oakland County, Michigan; Pennington County, South Dakota; Marion County, Illinois.

26. *E.g.*, Gem County, Idaho; Rooks County, Kansas; Hughes County, South Dakota; Ohio County, West Virginia; Columbia County, Wisconsin.

27. *E.g.*, Minnesota, Ohio, Oregon, South Dakota, and West Virginia. This information is based on responses to the NCJJ survey from individuals in each state.

28. *E.g.*, Idaho, Kansas, Michigan, Nebraska, and Wisconsin. This information is based on responses to the NCJJ survey from individuals in each state.

29. Leonard Edwards, *Dealing with Parent and Child in Serious Abuse Cases*, in *Protecting Children Through the Legal System* 214 (American Bar Ass'n 1981).

30. *Id.*

31. T. Curran, *An Attorney's View: Representing the Abused Child in the Dependency Court System*, in Nat'l Child Advoc. 4 (Winter 1997-1998).

32. *Id.*

33. Douglas Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 Am. Crim. L. Rev. 315, 318 (Fall 1986).

34. *See generally Children With Parents in Prison*, Child Welfare: J. Pol'y, Prac. & Program (Special Issue) (Child Welfare League of America, Sept./Oct. 1998).

35. John E.B. Myers, *Legal Issues in Child Abuse and Neglect* 19 (Sage Publications 1992).

36. Curran, *supra* note 31, at 6 ("Attorneys quickly learn that most of the cases presented in dependency court proceedings have both legal and psycho-social components, and the psycho-social components often significantly outweigh the legal ones").

37. Besharov, *supra* note 33, at 322.

38. U.S. Const. amend. V.

39. *See generally* Malloy v. Hogan, 378 U.S. 1 (1964); Kastiger v. U.S., 406 U.S. 441 (1972); Lefkowitz v. Turley, 414 U.S. 70 (1973), U.S. v. Sharp, 920 F.2d 1167 (1990); and Chan v. City of Chicago, 916 F. Supp. 804 (1996).

40. Patton, *supra* note 24, at 511.

41. Jinanne S.J. Elder & Jean C. McEwen, *The Interrelation Between Criminal and Civil Child Abuse Proceedings*, in *Law for Children* 238, 239 (ABA Center on Children and the Law ed., 1990).

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42. William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. Louisville J. Fam. L. 37, 57 (1992).
 43. *Id.*
 44. *Id.* at 45.
 45. Matter of the Welfare of S.A.V. and S.M.V., 392 N.W.2d 260, 261 (Minn. App. 1986).
 46. *Id.*
 47. *Id.* at 262.
 48. *Id.*
 49. *Id.* at 263.
 50. *Id.* (citing Parker v. Hennepin County Dist. Ct., 285 N.W.2d 81, 82–83 (Minn. 1979)).
 51. *Id.*
 52. *Id.*
 53. *Id.* at 264.
 54. *Id.* (citing Lefkowitz v. Turley, 414 U.S. 70, 77–78 (1973) (citing Kastigar v. United States, 406 U.S. 441 (1972))).
 55. *Id.*; see *In re* Welfare of Solomon, 291 N.W.2d 364 (Minn. 1980); Minn. Stat. § 260.221(b)(5) (1984).
 56. *S.A.V. and S.M.V.*, 392 N.W.2d at 260, 261.
 57. *Id.*
 58. *Id.*
 59. Matter of the Welfare of S.A.V. and S.M.V., 392 N.W.2d 260, 268 (Randall, J., dissenting).
 60. *Id.*
 61. *Id.*
 62. *In the Interest of* H.R.K., R.M.A.C., and R.L.C., 433 N.W.2d 46 (Iowa Ct. App. 1988).
 63. *Id.* at 50.
 64. *In re* Interest of Clifford M. et al., 577 N.W.2d 547, 551 (Neb. Ct. App. 1998).
 65. *Id.* at 554.
 66. *Id.*; Mullin v. Phelps, 647 A.2d 714 (1994); Matter of Welfare of J.G.W., 433 N.W.2d 885 (Minn. 1989); Matter of Welfare of J.W., 415 N.W.2d 879 (Minn. 1987).
 67. *In re* Interest of Clifford M. et al., 577 N.W.2d 547, 558 (Neb. Ct. App. 1998).
 68. *Id.* at 559.
 69. Patton, *supra* note 24, at 485–86.
 70. See, e.g., Cal. Welf. & Inst. Code § 355.1(d) (West Supp. 1992): “Testimony by a parent, guardian, or other person who has either the care or custody of a minor ... shall not be admissible as evidence in any other action or proceeding.”
 71. Elder & McEwen, *supra* note 41, at 252.
 72. *Id.* at 253 (citing *In re* Jessica B., 254 Cal. Rptr. 883, 893 (1989)).
 73. See Cal. Welf. & Inst. Code § 827(a) (West Supp. 1992).
 74. Sprague & Hardin, *supra* note 12, at 256.
 75. *Id.* at 244.
 76. Besharov, *supra* note 33, at 356.
 77. Sprague & Hardin, *supra* note 12, at 249.
 78. Edwards, *supra* note 29, at 224. Judge Edwards also describes a 1980 study conducted by Dr. Inger Sagatun, in which results showed that court-ordered therapy is much more effective than therapy voluntarily undertaken. See n.12 (Dr. Inger Sagatun, *The Effects of Court-Ordered Therapy on Incest Offenders*, in 17 In Brief 28–39 (Santa Clara County Bar Ass’n 1980).
 79. Besharov, *supra* note 33, at 355.
 80. But see Judge James J. Delaney, *The Battered Child and the Law*, in *Helping the Battered Child and His Family*, *supra* note 1, at 187, 192: “[T]he criminal process as a solution to child abuse is usually totally ineffective. Probably it has some deterrent effect on the parent capable of controlling his conduct, but its chief value lies in satisfying the conscience of the community that the wrong to a child has been avenged. That the true causes of the battering parent’s conduct have not been sought out is of little concern.”
 81. ABA Model Rules of Professional Conduct Rule 3.8(a) (1988).
 82. *Id.* at Rule 3.8(a) cmt.
 83. Besharov, *supra* note 33, at 337.
 84. F. Chris Austin, *Missing Tools in the Federal Prosecution of Child Abuse and Neglect*, 8 BYU J. Pub. L. 209 (Jan. 1993).
 85. Besharov, *supra* note 33, at 408.
 86. Curran, *supra* note 31, at 5: “Representing dependent children involves much more than knowledge of statutes, cases and rules of evidence. In fact, it is a unique, multi-faceted area of the law which also requires attorneys to have a knowledge of the behavioral and social sciences, such as psychology and sociology, as well as specialized

areas such as child development, children's memory and suggestibility, trauma and its effects on children, language and development, and of course, a sound understanding of current child maltreatment research." See also National Council of Juvenile and Family Court Judges, Resources Guidelines: Improving Court Practice in Child Abuse & Neglect Cases 23 (NCJFCJ 1995); Jacob Isaacs, *The Role of the Lawyer, in Helping the Battered Child and His Family*, *supra* note 1, at 225, 238: "It is apparent that counsel in child abuse cases must be thoroughly familiar with both the substantive and procedural law which governs the proceeding in which he is participating. In addition he must know how to read and evaluate, at least to a limited degree, medical diagnostic reports and the reports of psychiatrists, psychologists and probation officers. He must have at least a passing familiarity with the medical and psychiatric literature in the field of child abuse and be acquainted with treatment techniques and their potentials and limitations. He must know the range of alternative dispositions which are available to the court and have at least general knowledge as to the community resources and facilities which may be called upon as therapeutic resources."

87. See generally Sprague & Hardin, *supra* note 12, at 239.

88. Donald N. Duquette, *Lawyers' Roles in Child Abuse Proceedings*, in *The Battered Child*, *supra* note 1, at 460, 471.

89. Mimi Laver, *Advice for Agency Attorneys and Caseworkers: Working Well Together*, ABA Child L. Prac. 98 (Sept. 1998).

90. M. Hardin et al., Draft Monograph on the Results of State Court Assessments 36 (ABA Center on Children and the Law, Aug. 3, 1998).

91. *Id.* at 36.

92. *Id.* at 37.

93. West Virginia Child Abuse and Neglect Proceedings Rule 5.

94. Matter of Taylor B., 491 S.E.2d 607, 613 (W. Va. 1997).

95. *Id.*

96. However, the criminal prosecuting attorney will generally review all investigative reports concerning incidents of child abuse or neglect for potential criminal liability.

97. Institute of Judicial Administration-American Bar Ass'n, IJA-ABA Standards Relating to Abuse and Neglect, Part IX: Criminal Liability for Parental Conduct 164 (Ballinger Publishing Co. 1977).

98. Edwards, *supra* note 29, at 222.

99. *Id.* at 221.

100. Sprague & Hardin, *supra* note 12, at 255.

101. Edwards, *supra* note 29, at 222.

102. *Id.*

103. *Id.*

104. Sprague & Hardin, *supra* note 12, at 267.

105. See generally *id.*

106. Charles A. Phipps, *Child Abuse Legislation in the 1990s*, 32 APR Prosecutor 26, 28 (1998).

107. *Id.*

108. J. Kolbo & E. Strong, *Multidisciplinary Team Approaches to the Investigation and Resolution of Child Abuse and Neglect: A National Survey*, in *Child Maltreatment* 65, tbl.1 (Feb. 1997).

109. Faye F. Untalan & Crystal S. Mills, *Multidisciplinary Approaches in Child Abuse and Neglect*, in *Interdisciplinary Perspectives in Child Abuse and Neglect* 1, 10-13 (Faye Untalan & Crystal Mills eds., Praeger Pub. Text 1992).

110. Kolbo & Strong, *supra* note 108, at 61.

111. W. Va. Code §§ 49-5D-2 and 49-5D-3 (1996).

112. Kolbo & Strong, *supra* note 108, at 65.

113. *Id.*

114. *Id.* at 68, 70.

115. Sprague & Hardin, *supra* note 12, at 260.

116. Kolbo & Strong, *supra* note 108, at 67.

117. Donald C. Bross, *Multi-disciplinary Child Protection Teams and Effective Legal Management of Abuse and Neglect*, in *Protecting Children Through the Legal System* 506 (American Bar Ass'n 1981).

118. *Id.*

119. *Id.*

120. Barbara E. Smith, *Prosecuting Child Physical Abuse Cases: Lessons Learned From the San Diego Experience*, in National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, Research in Brief 1 (June 1995). The National Institute of Justice also published a research update (with the same title) discussing the same research study in May 1995. *Prosecuting Child Physical Abuse Cases: Lessons Learned From the San Diego Experience*, National Institute of Justice Update (May 1995).

121. *Id.* at 2.

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122. *Prosecuting Child Physical Abuse Cases: Lessons Learned From the San Diego Experience*, National Institute of Justice Update 1 (May 1995).
 123. *Id.*
 124. Smith, *supra* note 120, at 4.
 125. *Id.* at 9.
 126. *Id.* at 10.
 127. *Id.* at 9.
 128. Laver, *supra* note 89, at 97.
 129. *Id.*
 130. West Virginia Court Improvement Oversight Board, Court Performance in Child Abuse and Neglect Cases: Assessment Report and Improvement Plan 59 (Sup. Ct. Admin. Office, W. Va., July 18, 1996).
 131. W. Va. Code § 49-6-10 (1996).
 132. W. Va. Code § 49-5-12 (1996).
 133. W. Va. Code § 49-7-26 (1996).
 134. Laver, *supra* note 89, at 97.
 135. *Id.* at 98.
 136. *Id.*
 137. *Id.*
 138. *In re Jonathan G.*, 482 S.E.2d 893, 909 (W. Va. 1996).
 139. *Id.* at 901 n.13.
 140. *Id.* at 909.
 141. *Id.* (citing W. Va. Code § 49-7-26 (1996)).
 142. *Id.*
 143. *Id.*
 144. *Id.* at n.34.
 145. State *ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 564, 490 S.E.2d 642, 651 (1997).
 146. *Id.*
 147. *Id.*
 148. David J. Herring, *Agency Attorney Training Manual: Achieving Timely Permanence for Children by Implementing the Private Model of Legal Representation for the State Agency in Child Abuse and Neglect Matters*, University of Michigan Law School, Child Advocacy Law Clinic I-1 (1988-1991).
 149. *Id.* at I-4.
 150. *Id.* at I-5.
 151. *Id.*
 152. *Id.* at I-6.
 153. *Id.*
 154. *Id.*
 155. *Id.* at I-7.
 156. *Id.*
 157. *Id.* at I-8.
 158. *Id.* at I-1.
 159. *Id.* at I-8.
 160. *Id.* at I-9.
 161. *Id.*
 162. *Id.* at I-10.
 163. *Id.*
 164. *Id.* at I-13.
 165. *Id.*
 166. *Id.*
 167. *Id.* at I-14.
 168. *Id.* at I-17.
 169. David J. Herring, *Legal Representation for the State Child Welfare Agency in Civil Child Protection Proceedings: A Comparative Study*, 24 U. Tol. L. Rev. 603 (1993).
 170. *Id.* at 610-11.
 171. *Id.* at 611.
 172. Telephone interview with Florida Child Welfare Legal Services attorney, Dec. 1998.
 173. The Florida Bar *in re* Advisory Opinion HRS Lawyer Counselor, 518 So. 2d 1270 (Fla. 1988).
 174. *Id.* at 1271.
 175. *Id.* at 1272.
 176. The Florida Bar *in re* Advisory Opinion HRS Non-lawyer Counselor, 547 So. 2d 909 (Fla. 1989).
 177. *Id.* at 910: "Among the conclusions reached in the course of this Committee's inquiry into the harm that occurs to children under the aegis of the child welfare court system, perhaps the most direct conclusion is that a greater investment of time by the lawyers in the system is necessary, if we are to protect the rights of the children and families whose lives come under the control of the system. As the system is arranged now, HRS counselors of necessity fail their clients in two ways. First, they are made to assume the role of legal advocate for their clients; since counselors' experience and training have prepared them for social work and not legal practice, their clients suffer through inadequate legal representation. Second, the time

invested by counselors in preparing inadequate legal cases is time that could far better be spent improving their performance of the social services for which they are trained. The reasonable answer for the good of Florida's children is to provide additional training to counselors in the aspects of the legal process for which they *must* take responsibility, and assure that those aspects of the process which require legal judgment, or where important rights are at stake, are left in the hands of proper legal counsel."

178. *Id.*

179. *Id.* at 911.

180. Telephone interview with Florida State's Attorney, Dec. 1998.

181. Please note that these numbers do not correspond to the number of surveys. Rather, these figures reflect the number of times that respondents offered a particular reason for their opinion. Respondents frequently cited more than one reason for their answer.

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APPENDIX

NCJJ Exploratory Survey Questionnaire

Office: _____

Name: _____

Telephone: _____

Title: _____

Address: _____

State: _____

1. What is the title of the prosecuting attorney? (e.g., District Attorney, County Attorney, Prosecuting Attorney, etc.)

2. Please indicate and describe the authority granted to this prosecuting attorney under the law.
 - _____Criminal Authority (please describe)

 - _____Civil Authority (please describe)

3. Approximately what percentage of the workload is attributable to each category?
 - _____Criminal matters _____Civil matters

4. Is this prosecuting attorney responsible for the criminal prosecution of a parent or guardian in cases of criminal abuse or neglect?
 - _____Yes _____No

5. Is this prosecuting attorney also involved in civil abuse, neglect and dependency proceedings?
 - _____Yes _____No

- 5(a). If yes, in what capacity? (e.g., providing representation to the social services agency, representing the interests of the state, etc.)

- 5(b). If yes, how is this involvement arranged? (e.g., it is the same attorney handling both the criminal and the civil cases, it is different attorneys in the same office handling the two cases separately, etc.)

- 5(c). If two attorneys in the same office or department are handling the civil and the criminal cases, what type of interaction occurs between them? (e.g., sharing case files and information, attending hearings and meetings for both cases, etc.)

- 5(d). Is this interaction a conflict for the attorneys? If so, how is it resolved?

APPENDIX

Questions 6 and 7 refer to situations where the prosecuting attorney is involved in dependency proceedings as well as to situations where the prosecuting attorney is only responsible for the adult criminal prosecution. In both contexts, what happens in one case can potentially influence or affect what happens in the other case.

6. What happens if the prosecuting attorney is proceeding in a way that the agency feels is contrary to the best interests of the child? (e.g., pursuing a criminal conviction when the parent is cooperating with the social services agency plan, etc.)
7. What happens if the social services agency is proceeding in a way that the prosecuting attorney feels is contrary to the best interests of the child? (e.g., the prosecuting attorney disagrees with a recommendation for increased visitation, etc.)

8. Based on the answers provided above, please consider and respond to the following:

It has been suggested that when the same attorney or the same attorney's office is involved in both the civil dependency proceeding and the adult criminal proceeding, a potential exists for accessing information that would not otherwise be available in criminal discovery. If a parent recognizes that the information they provide to the social services agency could ultimately incriminate them, they may be less likely to cooperate with the social service agency goals and objectives. Agency efforts to address issues in the family are undermined and remain unresolved, to the detriment of the children.

It has also been proposed that in the context of protecting children from abuse and neglect, access to as much information as possible is critical for determining the best interests of the children. The issue may not be so much what the attorney knows, but what the attorney may introduce into evidence in court.

Do you think that the same attorney should be involved in both the dependency proceeding and the adult criminal prosecution?

____ Yes

____ No

Why or why not?

Please feel free to include any additional notes or information that you think is relevant. Thank you very much for your assistance!

